IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE C. DEHOYOS, EVA PEREZ-DEHOYOS, GEORGIA HARRISON, CHARLES WHITE, SHERYL H. FRANKS, and MARTEL SHAW, Individually and on Behalf of Others Similarly Situated, Plaintiffs, vs. ALLSTATE CORPORATION, ALLSTATE INSURANCE COMPANY, ALLSTATE TEXAS LLOYD'S, and ALLSTATE INDEMNITY COMPANY, Defendants.	)	CIVIL ACTION NO. SA-01-CA-1010-FB

ORDER DENYING MOTION TO DISMISS

Plaintiffs in this case essentially allege that Caucasians are in good hands with Allstate, but for non-Caucasians it is hands-off. The Court deduces defendants deny dastardly discriminatory dealings.

Before the Court are Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 8), Plaintiffs' Memorandum in Opposition to Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 20) and Defendants' Reply in Support of Motion to Dismiss (marked "Received" by the District Clerk on March 18, 2002). Also pending are Plaintiffs' Motion for Additional Pages for Plaintiffs' Response to Defendants' Motion to Dismiss (docket no. 19) and defendants' Unopposed Motion for Extension of Page Limit (docket no. 21). After careful consideration, the Court is of the opinion the motion to dismiss (docket no. 19) should be denied. The Court is also of the opinion that

plaintiffs' motion for additional pages should be dismissed as moot as plaintiff's memorandum in opposition to defendants' motion to dismiss (docket no. 20) has been filed as part of the record in these proceedings. The Court is further of the opinion that defendant's unopposed motion for extension of the page limit (docket no. 21) should be granted such that Defendants' Reply in Support of Motion to Dismiss (marked "Received" by the District Clerk on March 18, 2002) should be filed as part of the record in these proceedings.

BACKGROUND

Six proposed class members from Texas and Florida bring this action against the defendant property and casualty insurers to challenge credit scoring as a form of unfair racial discrimination pursuant to which defendants charge non-Caucasians higher rates. According to plaintiffs' complaint, defendants obtain information from credit reports on each applicant and improperly factor this information into a secretive[1] credit scoring formula. Plaintiffs allege defendants use this credit-scoring system to place non-Caucasian applicants in more expensive types of policies and to target non-Caucasians for the sale of more expensive policies than the policies sold to similarly situated Caucasians. The complaint states that plaintiffs have been wrongfully discriminated against on the basis of race in violation of 42 U.S.C. § 1981 (the right to be free of racial discrimination in making contracts); 42 U.S.C. § 1982 (the right to be free of racial discrimination in buying real property); and 42 U.S.C. § 3604 (the Fair Housing Act).

Defendants contend plaintiffs' claims that they were charged unfairly discriminatory premiums should be dismissed because: (1) plaintiffs' claims are barred by the McCarran-Ferguson Act; (2) this

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[1] Plaintiffs' assertion that "[d]efendants have consistently refused to disclose their credit algorithms" is undisputed.

Court should abstain from deciding these issues under the Burford abstention doctrine; and (3) the complaint fails to allege facts which, if proven, would establish that defendants engaged in intentional discrimination. Plaintiffs maintain that the McCarran-Ferguson Act does not preempt their claims. They further contend that the Burford abstention doctrine does not prevent this Court from retaining jurisdiction and addressing plaintiffs' claims. Plaintiffs also argue that they have sufficiently alleged discriminatory intent.

STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint which fails to state a claim upon which relief may be granted. SEE FED. R. CIV. P. 12(b)(6). A dismissal under rule 12(b)(6) is not a preferred avenue of adjudication and is looked upon with disfavor. See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983). In considering a rule 12(b)(6) motion, two general rules must be followed. Id. First, all well-pleaded facts in the complaint must be accepted as true, and a complaint should be liberally construed in favor of a plaintiff. Id. Second, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitled him to relief." Id. The Fifth Circuit has recognized two exceptions to the general rules. Where a complaint asserts merely conclusory allegations, a court should not accept as true these conclusory statements. Id. Also, where a complaint shows on its face it is barred by an affirmative defense, a court may dismiss the action for failing to state a claim. Id.

In determining whether a complaint states a claim upon which relief may be granted, a court must not look beyond the pleadings. See Carpenters Local Union No. 1846 v. Pratt-Farnsworth,

Inc., 690 F.2d 489, 499-500 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983). "[U]nless the pleadings on their face reveal beyond doubt that the plaintiffs can prove no set of facts that would entitle them to relief," a 12(b)(6) dismissal is improper. Garrett v. Commonwealth Mortgage Corp., 938 F.2d 591, 594 (5th Cir. 1991).

DISCUSSION

The McCarran-Ferguson Act

The McCarran-Ferguson Act precludes the application of a federal statute in the face of state measures "enacted . . . for the purpose of regulating the business of insurance," if the federal law does not "specifically relate[] to the business of insurance," and would "invalidate, impair, or supersede" the state's regulations. Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999); see also 15 U.S.C. § 1012(b). 42 U.S.C. § 1981, 42 U.S.C. § 1982 and the Fair Housing Act are not laws which "specifically relate[] to the business of insurance." This case, therefore, turns on whether the application of these federal anti-discrimination laws to plaintiffs' claims would "invalidate, impair, or supersede" Texas and Florida state laws regulating insurance. Defendants argue it would because: (1) both states have comprehensive insurance regulatory schemes and laws prohibiting discrimination in insurance; (2) state discrimination in insurance laws provide no private right of action; (3) state choices about the proper conduct of the business of insurance would be displaced; and (4) Texas and Florida insurance departments are investigating the effect of credit scoring on insurance.[2]

Courts have consistently rejected the McCarran-Ferguson Act defense in race-based discrimination cases despite comprehensive state regulatory schemes and laws prohibiting

[2] Defendants contend that plaintiffs challenge "rate making" practices, while plaintiffs contend they challenge "underwriting tools." For purposes of defendants' motion to dismiss, the Court makes no differentiation between the two.

discrimination in insurance. Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1223 (11th Cir. 2001) (McCarran-Ferguson Act does not prevent plaintiffs from proceeding with 42 U.S.C. § 1981 & 42 U.S.C. § 1982 race-based discrimination claims against insurer despite state statute prohibiting discrimination); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 293-301 (7th Cir. 1992) (McCarran-Ferguson Act does not preempt plaintiff's 42 U.S.C. § 1981, 42 U.S.C. § 1982 & Fair Housing Act claims arising out of insurance company's racially discriminatory practices despite comprehensive state regulatory mechanisms and anti-discrimination laws in context of insurance), cert. denied, 508 U.S. 907 (1993); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir. 1995) (McCarran-Ferguson Act does not preclude application of Fair Housing Act to claims of discrimination in insurance through redlining even though state had procedures to regulate insurance and applicable state law prohibited such discrimination). This is true even though the state statutes prohibiting discrimination in insurance provide no private right of action. NAACP, 978 F.2d at 295, 297; Cisneros, 52 F.3d at 1363.

In the absence of a state practice authorizing the challenged action, "[n]othing in this conclusion permits federal law to displace states' choices about the proper conduct of the business of insurance." NAACP, 978 F.2d at 297. Defendants have not drawn the Court's attention to any law, regulation or decision in Texas or Florida requiring the challenged credit-scoring system, condoning this practice, committing to insurers all decisions about credit-scoring or holding that this credit-scoring system does not violate state law. See id. (placing burden upon defendant to show that state has authorized race-based discriminatory insurance practices); see also Moore, 267 F.3d at 1222 ("Liberty National has not demonstrated that §§ 1981 and 1982, applied to insurance contracts, frustrate any declared state policy, because they have not demonstrated that it is in fact the policy of

Alabama to encourage or condone racial distinctions in the provision of life insurance."). Moreover, although investigations regarding the effect of credit scoring on insurance may be ongoing, no official of Texas or Florida has appeared to argue that a federal remedy under section 1981, section 1982 or the Fair Housing Act would frustrate any state policy. See NAACP, 978 F.2d at 297 (noting absence of state official who would state that "Wisconsin's word" is inconsistent with Fair Housing Act); see also Moore, 267 F.3d at 1222 (noting that, as in NAACP, state official "had not intervened to argue that the federal law at issue would frustrate its scheme of insurance regulation.").

Additionally, similar cases regarding discrimination in life insurance are pending in the Fifth, Second and Eleventh Circuits. See In re Industrial Life Ins. Litig., MDL Nos. 1371, 1382, 1390, 1391, 1395 (E.D. La); Moore v. Liberty Nat'l Life Ins. Co., No. CV-99-BU-3262-S (N.D. Ala.) Thompson v. Metropolitan Life Ins. Co., Nos. 00 Civ. 5071 (HB), 00 Civ. 9068 (HB), 01 Civ. 2090 (HB) (S.D.N.Y.). Plaintiffs represent, without dispute by defendants, that "a number of state insurance departments conducted their own investigations into the claims raised in these cases." The McCarran-Ferguson defense was raised in Moore, although the Eleventh Circuit held that the Act did not apply to bar plaintiffs' 42 U.S.C. § 1981 and 42 U.S.C. § 1982 claims. See Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1223 (11th Cir. 2001). The McCarran-Ferguson defense, plaintiffs maintain without challenge from the defendants, "was not even raised in the other cases."

Defendants state that "[p]laintiffs completely ignore the paradigm case for deciding this motion," Doe v. Mutual of Omaha. 179 F.3d 557 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000). In Mutual of Omaha, the Seventh Circuit held that an insurance policy with a cap on AIDS coverage did not violate Title III, the public accommodations provision, of the Americans With

Disabilities Act ("ADA"). Id. at 559-65.[3] "The common sense of the statute," the Court explained, "is that the content of the goods or services offered by a place of public accommodation is not regulated." Id. at 560. In this case, plaintiffs challenge access to insurance as opposed to the contents of the policy. See id. (There is . . . a difference between refusing to sell a health-insurance policy at all to a person with AIDS, or charging him a higher price for such a policy, . . . and . . . offering insurance policies that contain caps for various diseases some of which may also be disabilities."). Defendants' motion to dismiss based on the McCarran-Ferguson Act is denied.

The Buford Doctrine

Defendants contend this Court should dismiss plaintiffs' claims under the Buford abstention doctrine. Buford v. Sun Oil Co., 319 U.S. 315 (1943). The Fifth Circuit has determined:

> Essentially, Buford instructs a district court to weigh the federal interests in retaining jurisdiction over the dispute against the state's interests in independent action to uniformly address a matter of state concern, and to abstain when the balance tips in favor of the latter.

Webb v. B.C. Rogers Poultry, Inc., 174 F.3d 697, 700 (5th Cir.) (citations omitted), cert. denied, 528 U.S. 964 (1999). "But, this balance only rarely favors abstention." Id. (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996)).

Defendants reurge their argument that this type of insurance issue is one regulated by the states. However, as defendants point out, relevant state statutes do not provide for a private cause

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[3] This comports with the weight of authority from other circuit courts, including the Fifth Circuit. McNeil v. Time Ins. Co., 205 F.3d 179, 187-88 (5th Cir. 2000) (Title III of the ADA does not apply to coverage terms of health insurance policy), cert. denied, 531 U.S. 1194 (2001); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104,1116 (9th Cir. 2000) (disability plan which provided greater benefits for physical disabilities than for mental ones did not violate ADA); Lenox v. Healthwise, Ltd., 149 F.3d 453, 453 (6th Cir. 1998) (ADA does not prohibit health insurance providers from differentiating between persons with different disabilities); Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998) (insurance policy limiting coverage for mental disabilities does not violate Title III), cert. denied, 525 U.S. 1093 (1999); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1012 (6th Cir. 1997) (Title III does not regulate content of goods & services), cert. denied, 522 U.S. 1084 (1998).

of action under which plaintiffs could raise their claims. Only the federal anti-discrimination laws can provide plaintiffs with the relief they seek. Ordinarily, federal courts "have a virtually unflagging obligation . . . to exercise the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Additionally, there is a federal interest in this case as plaintiff's causes of action sound solely in federal law. See id. Finally, the Court does not find that adjudication of this matter would disrupt state efforts to establish coherent state insurance policies. See McNeese v. Board of Educ., 373 U.S. 668, 674 (1963). This is not a case which involves federal claims which are "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." Id.; see also See NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992) ("State and federal rules that are substantially identical but differ in penalty do not conflict with or displace each other."), cert. denied, 508 U.S. 907 (1993). Defendants' motion to dismiss based on the Burford abstention doctrine is denied.

Intentional Discrimination

Defendants allege plaintiffs have not sufficiently alleged discriminatory intent. After careful consideration of defendants' arguments, plaintiffs' response and complaint, the Court is of the opinion that plaintiffs have sufficiently alleged discriminatory intent for rule 12(b)(6) purposes at this early juncture in these proceedings. To this extent, defendants' motion to dismiss is denied.

OPTIONS TO APPEAL

The Court is of the opinion this Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of this litigation. See 28 U.S.C. § 1292(b) (governing interlocutory appeals). If defendants choose to do so, the Court will look favorably upon a properly

and timely filed motion for leave to file an interlocutory appeal. See FED. R. APP. P. 5 (governing requests for permission to appeal by permission); see also FED. R. APP. P. 8 (governing requests for stay pending appeal).

IT IS THEREFORE ORDERED that Before the Court are Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 8) is DENIED;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Additional Pages for Plaintiffs' Response to Defendants' Motion to Dismiss (docket no. 19) is DISMISSED as MOOT as plaintiff's memorandum in opposition to defendants' motion to dismiss (docket no. 20) has been filed as part of the record in these proceedings;

IT IS FINALLY ORDERED that defendants' Unopposed Motion for Extension of Page Limit (docket no. 21) is GRANTED such that the District Clerk is directed to file Defendants' Reply in Support of Motion to Dismiss (attached to the motion for leave and marked "Received" by the District Clerk on March 18, 2002).

It is so ORDERED.

SIGNED this 5th day of April, 2002.

FRED BIERY
UNITED STATES DISTRICT JUDGE

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